UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| DAVID R. MYRLAND,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF KIRKLAND, et. al.<br><br>Defendants. | CASE NO. C04-1640-MJB<br><br>ORDER DENYING PLAINTIFF'S MOTIONS FOR DEFAULT JUDGMENT AND STRIKING ANSWER AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT |

On July 23, 2004, Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 against the municipality and two municipal judges sitting *in pro tempore*. On July 23, 2004, Plaintiff filed a complaint followed by an Amended Complaint on September 1, 2004. Defendants' Answer was filed on June 6, 2005, eight and one-half months later. Plaintiff is seeking a Default Judgement for the late filing of the Answer. Defendants have filed a Motion for Summary Judgment. Both motions and a related motion to strike the answer will be addressed in this court order.

A. PROCEDURAL HISTORY

Procedurally, the timing matters. On July 23, 2004, Plaintiff filed a complaint.

Dkt. # 1 Five days later, on July 28, 2004, Defendants filed a notice of appearance. Dkt. # 3. On September 1, 2004, Plaintiff filed an Amended Complaint (Dkt. # 6) and on September 14, 2004, Defendants filed Initial Disclosures. Dkt. # 8. Plaintiff filed his Motion for Default Judgment on June 1, 2005 . Dkt. # 21. On June 6, 2005, five days later, the Defendants filed their Answer. Dkt. # 24. On June 13, 2005, Defendants filed their response to Plaintiff's motion for default judgment along with a Motion for Summary Judgment. Dkt. ## 25, 29. Plaintiff responded with a supplemental brief on June 16, 2005, and a reply to Defendant's response on June 23, 2005. Dkt. ## 31, 34. Thereafter, Plaintiff filed a Motion to Strike the Answer to which Defendants filed their response. Dkt. ## 35, 37. Plaintiff filed his response to the summary judgment motion on July 5, 2005. Dkt. # 38. Defendants filed their reply brief on July 8, 2005. Dkt. # 41. This matter is ripe for review.

B. PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

Federal Rule of Civil Procedure 55(a) authorizes default judgment where a party against whom affirmative relief is sought fails to plead or otherwise defend the action. Can the notice of appearance and the initial disclosures suffice as "otherwise defending" this action as contemplated by this rule?

The courts disfavor default judgment because cases should be decided on their merits whenever reasonably possible. *See Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (*citing Pena v. Seguros La Commercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985)). Moreover, the district court has wide discretion in determining whether judgment by default should be entered. *Henry v. Metrolpolitan Life Ins. Co.,* 3 F.R.D. 142 (W.D.Va. 1942).

Plaintiff argues that the late filing of the answer prejudiced him by impeding discovery and preparation for the trial set in September 2005.[1] Plaintiff claims that not only did Defendants fail to file a timely answer, they were also unresponsive to his attempts at communicating, failed to hold a conference, and were "willfully evasive" in their response to his request for admissions.[2] Dkt. # 21. Plaintiff emphasizes that defense counsel's maternity leave was an insufficient basis for delay in filing the answer. Dkt. ## 31, 34.

In response, Defendants argue that their actions demonstrate their willingness to defend against the lawsuit. Defendants note that defense counsel filed a Notice of Appearance five days after service and a short time later a notice of association of counsel was filed; Initial Disclosures pursuant to FRCP 26(a) were filed fourteen days after the Amended Complaint was filed and evidence was made available for Plaintiff's review; and Defendants filed their Status Report (intended to be a joint status report) without the benefit of Plaintiff's input because of his failure to attend/participate in the conference. Dkt. # 25. Defendants add that defense counsel, Ms. Wiley, filed a notice of unavailability because of maternity leave, which was served upon the court and the

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[1] In his supplemental pleading of June 16, 2005, Plaintiff implies that the Court's failure to set a hearing in this case on the noting date in some way reflects the court's bias or an appearance of unfairness. Dkt. # 31. The noting date is a in part scheduling device used to trigger the Court's attention to the matter and to safeguard against any cases "falling through the cracks." It is not a guaranteed date for response from the Court. The record shows that the Court gave both parties its assurances of due consideration during a conference call conducted after many, many inquiries by the Plaintiff for the court's attention to this matter.

[2] Plaintiff also alleges that Defendants received a request for a video or audio copy of his hearing and failed to comply with such a request. However, this request was made prior to the commencement this law suit and as such will not be considered by the court.

Plaintiff. Dkt. ## 25, 26. Once on maternity leave, Shannon M. Ragonesi, took over the case and in her declaration indicated she had not received further discovery requests from the Plaintiff, but rather only a demand letter dated March 14, 2005, and received on March 16, 2005. Dkt. ## 28, 30. In essence, Defendants urge the court to deny default judgement based upon a record that shows their intentions to defend the case despite the late filing of the answer due to the counsel's maternity leave.

The Court concludes that Plaintiff's reliance upon Fed. R. Civ. P 55 (a) in this case is misplaced. The Court does not condone the late filing of the Answer, but does find that the Notice of Appearance, the Initial Disclosures, the response to the Request for Admissions, the filing of the Status Report, and Defendants' prompt response to the motion for default judgment do demonstrate compliance with the requirement "to plead or otherwise defend" under Fed. R. Civ. Pro. 55(a).

Under these facts, we find persuasive the view that Plaintiff was not prejudiced by the Defendants' failure to file an Answer. In addition to obtaining the Initial Disclosures, Plaintiff received Defendants' responses to his Request for Admissions. While Plaintiff alleges that these responses were evasive, Defendants point out that he did not inform them that he considered the responses incomplete, request supplementation, or move to compel additional responses. Thus, Plaintiff was not prevented from engaging in discovery or preparing for trial. Equally persuasive is the fact that Plaintiff failed to participate in the discovery conference, which preceded Ms. Wiley's leave. Plaintiff does not appear to lack any desire nor ability to zealously pursue a favorable ruling, which arguably was available anytime after October, 2005, though he waited until June, 2005. Whether he waited to file this motion knowing of counsel's unavailability due to maternity leave, the Court will not speculate. As will be discussed below, the court

favors resolution of this case on its merits. *See Eitel*, 782 F.2d at 1472. Accordingly, in the exercise of this court's discretion in these matters, Plaintiff's Motion for Default Judgment is Denied.[3]

C. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL

Defendants Hurtado and Graham assert relief from judgment on all claims based upon the doctrine of absolute judicial immunity. Defendant City of Kirkland seeks dismissal based upon a Plaintiff's failure to meet the requirement for suing a municipality.

**1. Summary Judgment Standard**

Defendants have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. "One of the primary purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *See Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Swayze v. United States*, 785 F.2d 715, 717 (9th Cir. 1986) (citing Fed. R. Civ. P. 56(c)). The standard provided by Rule 56 requires not only that there be some alleged factual disputes between the parties, but also that there be *genuine* issues of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of [the] . . . claim at trial." *See Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

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[3] Based upon this order denying default judgement, the motion to strike answer is also DENIED.

To meet the initial burden under Rule 56, "the party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *See Celotex*, 477 U.S. at 324. The burden shifts to the non-movant only if the moving party has established that there is a lack of a genuine issue of material fact. *See Anderson,* 477 U.S. at 250. If the movant meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *See First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

**2. Civil Rights Action under Title 42 Section 1983**

In order to state a claim under § 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution or laws of the United States; and (2) that such deprivation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Plaintiff must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the complaint. Furthermore, Plaintiff must set forth the specific factual basis upon which he or she claims each defendant is liable. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

a. Judicial Immunity

Regarding the issue of immunity as a defense for Hurtado and Graham, Plaintiff argues that Defendant Hurtado "had no oath of office" and as such is not entitled to judicial immunity. Dkt. # 38. Plaintiff's argument rests on his belief that Judge Hurtado did not complete an Oath of Office, and the Oath of Office presented by Defendants (Dkt.

# 30, ex. 2) was fabricated. Plaintiff, however, has presented no evidence regarding his allegation, other than his own belief.

As a settled matter of law, judicial immunity is a defense to an action under § 1983. *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). Both Hurtado and Graham were acting as *pro tempore* judges and engaged in their official duties when the Plaintiff appeared before them as a person accused of misdemeanor offenses. Dkt. # 29. None of the arguments and citations offered by Plaintiff overcome the fact that judges are afforded absolute immunity for acts done in their official capacity. Accordingly, actions under § 1983 against these two defendants are dismissed with prejudice and their summary judgement is GRANTED.

b. Municipal Liability

A municipality cannot be held liable under § 1983 solely on the basis of supervisory responsibility or *respondeat superior*. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). In order to sue the City of Kirkland, Plaintiff must allege facts showing that any constitutional deprivation suffered was the result of a "custom or policy" of City of Kirkland. *See, e.g.*, *Ortez v. Washington County*, 88 F.3d 804, 811 (9th Cir. 1996).

Here, Plaintiff claims that he "presumed the matter of policy was well settled, since the acts complained of took place in open court, in front of policy makers in executive and judicial branches ..." Even assuming, *arguendo,* that the acts complained of amounted to a constitutional deprivation, Plaintiff has proffered no proof that this one instance came as a result of "custom or policy." Under *Monell v. Department of Social Services,* 436 U.S. 658, 695 (1978) and the doctrine of *respondeat superior*, when the elements for a § 1983 action against a municipality are not met, such action should be

dismissed. Thus, in the absence of any facts regarding custom or policy, this claim is not sustainable. Defendant City of Kirkland's motion for summary judgement is GRANTED.

The Clerk is directed to send a copy of this order to Plaintiff and counsel for Defendants.

DATED this 12th day of August, 2005.

MONICA J. BENTON
United States Magistrate Judge